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Supreme Court of the United States

No. 73-1853

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

MILDRED K. GRIFFIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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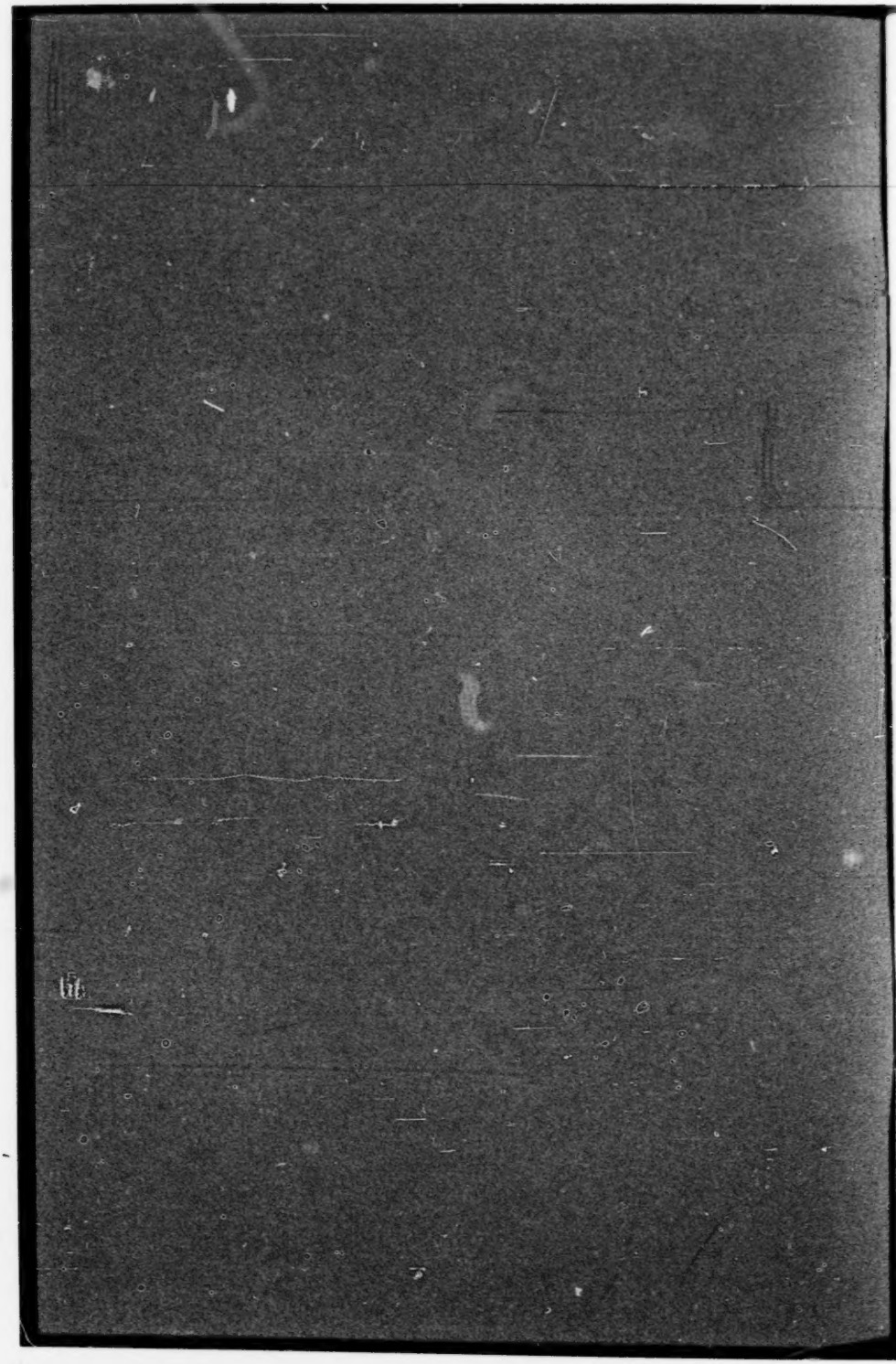

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Supreme Court of the United States

No. .....

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

MILDRED K. GRIFFIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Supreme Court of Ohio to review a final judgment of that Court.

OPINION BELOW

The Ohio Court of Appeals, Ninth District, issued its opinion on August 14, 1973 (Appendix C). The Supreme Court of Ohio dismissed the appeal therefrom, without opinion, in a judgment issued March 15, 1974 (Appendix D).

JURISDICTION

1. The final judgment of the Supreme Court of Ohio was issued March 15, 1974.

2. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Does the unexplained failure of a judge to complete a non-jury trial, in which he has heard five days of testimony and which he is able to complete, deprive a party of due process or equal protection of the law?

2. Is a party to a non-jury case deprived of due process or equal protection of the law where a second judge, without authority in law and over objection by a party, seeks to replace the original judge who had heard five days of testimony and who is able to complete the trial and before whom the case is still pending?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Fourteenth Amendment:

Section I: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

a. Merits of Complaint Not Involved

The substantive issues of the underlying divorce controversy are not involved in this petition. It is the irregular trial procedures which petitioner sets before the Court for review.

b. Course of Trial Proceedings

Respondent's complaint was filed in the Court of Common Pleas, Summit County, Ohio. Trial to the court commenced February 3, 1971. Five days of testimony were had before February 12, 1971, when the parties were advised that the trial judge would be absent for at least a week.

The trial judge returned to his judicial duties after three or four weeks (Appendix A) but he did not resume the trial.

The trial judge conducted other work and cases during the Spring, Summer, and Fall of 1971. In these months he issued interlocutory orders in the instant case while failing to complete the taking of trial testimony.

Respondent made no effort to resume or complete the trial.

On July 28, 1971, Petitioner filed a motion to dismiss for want of prosecution. In his dismissal motion petitioner raised the issues of denial of due process and equal protection.

After an eight month lapse in the trial the trial judge convened court on October 21, 1971 pursuant to notice that trial of the case would be resumed. It did not resume as scheduled. Instead, the trial judge heard arguments on Petitioner's motion to dismiss and on other pending motions.

On November 9, 1971, the trial judge issued a Finding (Appendix A) in which he admitted to negligence in failing to complete the trial. That Finding proposed to set aside the five days of testimony already taken and to set the case before a second judge.

In a letter to the first and to the then proposed second trial judge, dated November 12, 1971, Petitioner protested the unprecedented plan to have a second judge complete the trial that the able-bodied first judge had already started and was able to complete. The court did not respond to Petitioner's objection.

Despite there having been no adjudication of any issue in the case, the trial judge overruled Petitioner's motion to dismiss and issued a judgment of December 3, 1971, stating, in part:

> The Court further orders on its own motion that a new trial be granted in this case and that the same be set for trial on December 13, 1971 (Appendix B).

This order for a new trial later was declared by the appeals court to be "without legal import" (Appendix C).

A second judge proceeded to conduct a "new trial." At the start of this "new trial" on December 13, 1971 Petitioner protested the entire proceeding:

> Mr. Griffin: I would like to let the record show my objections to and my exceptions to the rulings of Judge Koledin in his finding and in his supplemental finding and in his judgments of December 3, 1971 and December 7, 1971.
>
> . . . .
>
> In fact, Judge Koledin even tried to declare a mistrial, but I don't understand how you can have a mistrial in a non-jury civil case; and I doubt if it has ever happened before in this jurisdiction. I consider *everything that transpires under Your Honor will have to be void and nullified.* (sic) I think you would agree to this in your own mind even if you won't agree out loud.

> Where would be the logical end? You could now hear five days of testimony, recess the case, and then months later decide not to decide the case and transfer it to another judge. This process could go on indefinitely. (Record, Tr. Vol. 3, pp. 7, 9. Emphasis supplied.)

The second trial judge did not rule on Petitioner's objection but proceeded with the purported new trial. In order to expedite this unusual trial proceeding to which Petitioner vigorously objected, a transcript of the five days of testimony before the first trial judge was filed with the Clerk. Petitioner stood on his objection to the hearing and to the consideration by the second judge of any evidence in the case. Petitioner did not offer any evidence. The second judge issued a judgment in the case.

c. Opinion of the Ohio Court of Appeals

The Court of Appeals, Ninth District of Ohio found that the first judge's December 3, 1971, order of a new trial was a nullity. It said:

> A new trial cannot be ordered until an adverse judgement is of record . . .
>
> . . . it is obvious that a new trial could not be granted . . .
>
> . . . We agree that the (sic) part of the order of Judge Koledin of December 3, 1971 was without legal import . . . (Appendix C).

The appeals court concluded that "on the 13th of December, 1971, the case, in effect, that was commenced in February, 1971, continued" under the second trial judge (Appendix C, p. 2).

The switch in judges was characterized by the appellate court as "irregular" and it concluded that "switching judges is not provided for in the Civil Rules." It held, however, that under the circumstances of the case, "it cannot be said that such an irregularity amounted to more than harmless error" (Appendix C, p. 3).

The Court of Appeals' attention was directed to the case of *Sharp v. Bryan* (1963), 119 Ohio App. 459, which found that "switching" judges mid-trial is a violation of the constitutional right to due process of law. The Court of Appeals refused to certify that its holding in the instant case was in conflict with this earlier Ohio decision. Had it certified the conflict, the Ohio Supreme Court would have been required to hear the case.

d. Order of the Ohio Supreme Court

An appeal as of right was taken by Petitioner to the Supreme Court of Ohio. Petitioner raised the due process and equal protection arguments he had been making since the filing of his July 28, 1971 Motion to Dismiss. The Ohio Supreme Court rejected the appeal without hearing "for the reason that no substantial constitutional question exists here" (Appendix D).

REASONS FOR GRANTING THE WRIT

1. The questions of the propriety of two different judges hearing parts of the same case, seriatim, has not been decided by this Court.

The salient facts of this appeal show a condition violative of constitutional due process. The non-jury trial in which Petitioner's rights were adjudicated was consecutively conducted by two different judges with eight months separating the two performances of judicial functions. Petitioner's rights were subjected to a hearing by two different fact-finders.

Implicit in procedural due process is the requirement that the hearing tribunal be a single body. Certainly a hearing could be held before several individuals comprising a single panel. This condition did not prevail here.

The first judge was alive, able-bodied, and not disqualified. He gave no reason for not finishing the trial he started.

Inherent in the hearing requirement of due process is that there be an auditor. Implicit in the presence of an auditor is unity. A person deciding a cause must be the person hearing the testimony. *Morgan v. United States,* 298 U.S. 468, and *Morgan v. United States,* 304 U.S. 1 (1937). Even where a fact-finder dies mid-testimony, a second hearing officer cannot pick up where the first left off over the objection of one of the parties. *S. Buchsbaum Company v. F.T.C.* (7th Cir. 1946), 153 F.2d 85.

Both the Ohio Court of Appeals and the Ohio Supreme Court have here found no denial of due process or

equal protection in the failure of a trial judge to complete the trial he started in February, 1971, and which he was continuously able to complete upon his return from a four week illness. The novel concept of "switching judges in mid-stream," without reason and without authorization, is here decided by the Ohio courts to be constitutionally permissible.

This Court has, of course, addressed itself to many facets of due process but not to the question of the substitution of a fact-finder midway in hearing. The singular unity of the fact-finder, whether a single person or a single panel, is so implicit in the due process requirement of a hearing that this Court has not had the opportunity to rule upon it. It is incongruent with our system for administering justice to have one fact-finder substituted for another without there being reason, authorization in law or consent. The extension of such a practice to jury cases repels logic and fairness. No court would allow the substitution midtrial of one jury for another. No less restraint should be exercised in a trial conducted by the court.

Rule 19 of this Court suggests that it may be interested in a case where a state court has decided a federal question of substance not heretofore determined by this Court. This rule certainly recommends the instant case to discretionary review by this Court.

2. Departure from the accepted course of judicial proceedings impels this Court's intervention.

The judicial proceedings in this case were highly irregular. The Judge returned to his duties after a four weeks' illness and failed to resume the trial in which he had taken testimony. He acted on other cases and even

acted in interlocutory fashion in the very case he failed to complete. He made an ineffective order for a "new trial." He gave no reason for substituting the second trial judge. Petitioner repeated at the appellate levels his objection that his constitutional guarantees were being violated or ignored. The departure of which Petitioner complains, from the accepted course of judicial proceedings, does not fall within the ambit of fair procedure.

Fairness could not be conferred on the trial proceedings in this case, as respondent has argued in the Ohio Courts, by the fact of the stipulation entered into by Petitioner before the second judge. The stipulation was entered into after the second judge proposed to conduct an entire "new trial." The purpose of the stipulation was solely to avoid repetition of five days of testimony and was neither an agreement nor an approval by Petitioner to the "switch in judges." In fact, as recognized by the Court of Appeals, the Petitioner never abandoned nor withdrew his objection to the second judge's performance of any judicial functions (Appendix C, pp. 2-3). The stipulation, designed to hasten the end of the proceeding, did not waive the Petitioner's claim of fatal irregularity and unfairness.

Rule 19(1)(b) of this Court suggests that it may review a case where a federal court of appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of supervision. Rule 19(2) renders this consideration equally applicable to state courts.

3. Fundamental considerations of due process and equal protection, and the viability of the legal system, beckon this Court to review this case.

The irregularity of procedure in this case constitutes more than a departure from the usual course of judicial

conduct. The trial court conduct in this case, even under Ohio Law, amounts to a violation of due process of law.

Sharp v. Bryan (1963), 119 Ohio App. 459, recognizes that switching judges mid-trial violates due process of law. That case dealt with a judge who absented himself after the jury retired to deliberate before returning a verdict. The jury emerged with questions which were answered by a second judge. In reversing, the Erie County Court of Appeals said at 463:

> The trial once undertaken by the judge should be attended to its final determination and conclusion. Moving on to another assignment before such time is not excusable expediency as against the right of litigants to a fair and completed trial under due process of law.

In *Sharp*, the failure of the original judge to respond to the fact-finder's questions of the law was held to be a violation of due process. In the instant case, the judge was the ultimate finder of facts. With this extra responsibility, he nonetheless turned the entire trial over to a second judge mid-testimony. The Summit County Court of Appeals found such error to be harmless. The Ohio Supreme Court declined to review. The law of Ohio, therefore, now holds that deprivation of a right of such constitutional magnitude as due process can be harmless. Petitioner contends that a violation of due process of law is inherently harmful.

In *Steffel v. Thompson*, No. 72-5581, March 29, 1974, 42 L.W. 4357, by a unanimous opinion, this Court said at 4364:

> The solitary individual who suffers deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others.

This language reflects the Court's concern that the constitutional error is inherently harmful.

The harm inherent in constitutional error where there is a deprivation of due process extends from the nature of the hearing. Due process requires at a minimum that persons who enforce claims of right and duty through the judicial process be given a meaningful opportunity to be heard. *Boddie v. Connecticut* (1971), 401 U.S. 371. A hearing to comport with procedural due process must be at a meaningful time and in a meaningful manner. *Fuentes v. Shevin* (1972), 407 U.S. 67. Petitioner claims that "switching" judges which raises the prospect of an unending trial robs an adjudication proceeding of any meaning.

This case has broad implications involving the viability of the Ohio legal system. Under the law of this case no litigant in Ohio can be confident that the judge who presides over his case at its inception will conduct it to final judgment. Ohio appears to have adopted an "unlimited substitution of judges" rule. The trial judge, according to this case, may take evidence and then recess the trial for months, ultimately ordering a "new trial" before another judge. The second judge may start to hear testimony, call a recess and then turn the case over for another "new trial" before a third judge. Thus, not only is there uncertainty as to whether the first judge will complete the trial but there is no assurance that the trial will be completed by any judge.

The idea that an able-bodied judge has no duty to complete a trial once begun is so repugnant to any orderly system of adjudication that it ought not be allowed to stand.

The concept that a second judge may intervene in a case before another judge and either repeat or complete the trial, and enter a judgment, is equally repugnant to western jurisprudence.

This case is to be distinguished, of course, from action taken to move a case *to* trial and from action taken to overcome delay encountered in obtaining an opinion *after* trial. The basic issue here is whether there is an obligation on the part of a judge to complete a trial expeditiously, or to complete it at all, once the taking of testimony has begun.

CONCLUSION

Unless this Court specifically states its mind on the question of the essential unity of a hearing officer, whether an individual or a panel, that unity can only be implied from the due process requirement of a hearing. The Court in this case can make express that implicit requirement.

This case leaves Ohio law in a condition that requires supervision. By itself this case sets precedent for an unending trial. Together with *Sharp, supra,* this case establishes in Ohio the concept of harmless constitutional error.

The Court should weigh heavily the granting of the writ sought here.

Respectfully submitted,

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APPENDIX A

Finding of Court of Common Pleas

No. 282105

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, SUMMIT COUNTY, SS

MILDRED K. GRIFFIN,
Plaintiff,

vs

ORWIN B. GRIFFIN, JR.,
Defendant.

FINDING

SAM KOLEDIN, *Judge*

This matter came on hearing before the Court on the appeal from the defendant of the Referee's recommendation wherein the Referee found the defendant guilty of contempt of court, which came on hearing on May 17, 1971. The Referee granted the plaintiff a judgment in the sum of $1,400 for arrearages in support payments to her by the defendant.

This matter is an unfortunate situation because the Court on February 3, 1971 began to hear this matter on its merits on the amended complaint and amended answer of the defendant.

The Court, after five days of hearing the evidence, became ill and was unable to continue the matter. After

the Court returned in three or four weeks, the attorneys did not seem diligent in having the matter set down and the court was negligent in not setting the matter down for final hearing to complete the matter.

The plaintiff in May or thereabouts then moved that the Court find the defendant guilty of contempt in view of the fact that he had stopped paying under the temporary order made on April 14, 1971. Defendant readily admitted to the Court that he did not pay under the court order, so there is no question of his being guilty of contempt and a judgment should issue to the plaintiff in the amount of the arrearage found by the Referee.

The motion in opposition to the plaintiff's motion is overruled.

The motion in opposition to the finding of the Referee is overruled.

The motion to dismiss and motion for judgment for the defendant is overruled.

The Court will take into consideration, however, that the defendant husband was laid off as of July 20, 1971 and as of that date the Court will modify the order of April 14, 1971 from $700 a month to $200 a month for the support of the minor children.

All further orders made on April 14, 1971 will remain in full force and effect.

The Court realizes this matter should be set down and the Court sets aside the testimony that was heard in five days of trial, from February through February 11th (sic), and hereby sets the case for hearing before Judge Luther Swaim on December 13, 1971.

Judgment order to be drawn accordingly.

APPENDIX B

Judgment Order of Court of Common Pleas

(Filed December 3, 1971)

No. 232105

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, SUMMIT COUNTY, SS

MILDRED K. GRIFFIN,
Plaintiff,

vs

ORWIN B. GRIFFIN, JR.,
Defendant.

JUDGMENT

This matter came on hearing before the Court on October 21, 1971 on the various motions of the defendant.

The Court, upon consideration thereof, finds that the defendant's opposition to finding which the Court considers to be a motion for review of the Referee's finding of May 17, 1971 to plaintiff's motion of April 20, 1971 and defendant's motion of April 27, 1971, should be affirmed, and accordingly, it is hereby ordered and adjudged that the judgment entered on said finding on July 2, 1971 be and the same hereby is affirmed.

The Court, upon consideration of the motion of the defendant to dismiss this cause and for an order granting judgment in favor of the defendant, dated July 28, 1971, finds that the same should be overruled. It is accordingly ordered and adjudged that said motion be and the same hereby is overruled.

The Court, upon consideration of motion of the defendant filed on August 16, 1971 for an order modifying the monthly support order to plaintiff heretofore made on April 14, 1970, finds that defendant's employment was terminated on or about July 20, 1971 and the Court accordingly orders that said monthly payments be and the same hereby are reduced to the sum of $200 per month, beginning with the month of August, 1971. All other orders of said date are to remain in full force and effect.

The Court further orders that that portion of defendant's said motion of said date for an order permitting defendant to enter and live at the premises known as 6768 Evergreen Road, Hudson, Ohio, for an order granting defendant exclusive custody of the minor children, for an order finding plaintiff in contempt of Court, and for other relief is hereby overruled.

The Court further orders that the remaining motion of the defendant filed on August 16, 1971 to set aside the judgment on August 4, 1971, be and the same hereby is overruled.

The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971.

/s/ SAM KOLEDIN
Judge

APPENDIX C

Opinion of Court of Appeals

(Dated August 14, 1973)

Case No. 7129

IN THE COURT OF APPEALS
STATE OF OHIO, SUMMIT COUNTY
NINTH DISTRICT

MILDRED K. GRIFFIN,
Plaintiff-Appellee

vs

ORWIN B. GRIFFIN, JR.,
Defendant-Appellant

OPINION

JONES, *P. J.*

Before this Court for review is an order of Judge Luther Swaim, sitting by assignment, of the Court of Common Pleas of Summit County, Ohio. In essence the order dissolved the marriage between Mildred Griffin, appellee and Orwin Griffin, appellant. Further, the order provided for custody of the two minor girls, issue of the marriage, support for the girls, and a distribution or division of the property, both real and personal.

The final order followed protracted litigation and, as a result of the order, 33 errors are assigned as prejudicial to the appellant. He seeks a reversal of the order after a review by this Court. In order to pass upon each error

assigned, this Court will address itself to the issues raised by the errors as a good many of them are basically duplications.

The first issue to be considered is whether or not Judge Swaim was qualified to sit on the case. Judge Swaim is retired and was assigned to Summit County as a Common Pleas Judge (visiting judge) by the Chief Justice of the Supreme Court of the State of Ohio. Art. IV, Sec. 6(c) of the Ohio Constitution provides that any voluntarily retired judge or one retired because of age may be assigned by the Chief Justice to active duty as a judge. Appellant argues that this amendment was not legally adopted by the people of the State of Ohio. We hold to the contrary and deny appellant relief as suggested by his assigned error 13 and all others referring to this issue.

The second issue that we address ourselves to is the significance of the order of Judge Koledin dated December 3, 1971, wherein he stated:

> "The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971."

This language is to be found in an order disposing of two written motions. Subsequently to the filing of the pleadings, this divorce proceeding became at issue and the case was commenced before Judge Koledin in February of 1971. Five days of testimony was heard by the Judge when the case was continued due to illness of the Judge. Motions were filed by both parties between February, 1971 and December 3, 1971 when the above-quoted language was put in an order. To that point the trial of the case had not been completed. Thus, what significance can be attached to the language, "a new trial be granted"?

What is the legal result of that language? The answer is "none". A new trial cannot be ordered until an adverse judgment is of record. It might be argued that the legal import is that of a mistrial. But why speculate when it is obvious that a new trial could not be granted as there was not an adverse order upon which such a second order could be predicated. On the 13th of December, 1971, the case, in effect, that was commenced in February, 1971, continued. Three things of significance should be noted here. First, Judge Swaim sat in place of Judge Koledin and, secondly, all of the evidence presented in February, 1971, before Judge Koledin was stipulated to be presented before Judge Swaim. In effect the stipulation declared that if those same parties were to appear before Judge Swaim, their testimony (and exhibits) would be as previously given, reduced to writing and presented to Judge Swaim. Thirdly, appellant objected to the switch in judges and claimed that part of the order of December 3, 1971 was for naught. We agree that the part of the order of Judge Koledin of December 3, 1971 was without legal import. However, by stipulation, appellant agreed to have all of the February evidence before Judge Swaim. So the switch in judges, although irregular, did not result in error to the prejudice of appellant. In other words, the key to our ruling on this issue of switching judges in midstream is not provided for in the Civil Rules; however, under the circumstances of the facts of this case, it cannot be said that such an irregularity amounted to more than harmless error.

Another issue raised by the errors assigned concerns itself with the holding of Judge Swaim, i.e., granting the divorce, awarding the custody and child support, and the division of property. A reading of the record discloses ample evidence upon which Judge Swaim could decide as

he did in this regard. Appellant offered no evidence on his own behalf and it was up to the trier of the facts to determine whether or not appellee had made out a case. He did and we agree. Accordingly, this issue, too, is resolved in favor of the appellee.

Appellant claims that Judge Koledin erred in admitting testimony of Dr. Clemente. Appellant objected to this and, apparently, the objection has not been ruled upon. The admission of the testimony was proper. Here, too, the error, if any, was harmless. Appellant complains that Judge Koledin erred in entering an order of July 2, 1971. At this point Judge Koledin adopted a referee's report. There is no error in this regard.

Hopefully, this Court has considered all of the issues brought to its attention for review. Judgment affirmed.

/s/ GEORGE M. JONES
Presiding Judge

HOFSTETTER, *J.*,
COOK, *J.*, Concur.

APPENDIX D

Judgment of Supreme Court of Ohio

(Dated March 15, 1974)

No. 74-59

THE SUPREME COURT OF OHIO

MILDRED K. GRIFFIN,
Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

..... Deputy